No. 96-1768

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

C. ELVIN FELTNER, JR.,
Petitioner,

v.

COLUMBIA PICTURES TELEVISION, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether, following a district court's summary judgment determination of liability for copyright infringement, 17 U.S.C. § 504(c) permits or requires that a jury, rather than the district court judge, exercise discretion to determine the award of Statutory Damages within the limits established by Congress.

(2) Whether, following a district court's summary judgment determination of liability for copyright infringement, the Seventh Amendment to the United States Constitution entitles the defendant to have a jury, rather than the district court judge, exercise discretion to determine the award of Statutory Damages within the limits established by Congress in 17 U.S.C. § 504(c).

STATEMENT PURSUANT TO RULE 29.6

Sony Corporation is the corporate parent of Respondent Columbia Pictures Television, Inc. Columbia Pictures Television, Inc. does not have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Case Background

Petitioner, C. Elvin Feltner, Jr. ("Feltner") is the owner of Krypton International Corporation, which in turn owns three corporations, each of which owns and operates a television station in the southeastern United States. Feltner is also the chief executive officer and chief operating officer of each of the three television stations.

In December 1991, respondent, Columbia Pictures Television, Inc. ("Columbia"), sued Feltner and the stations on various legal theories, including copyright infringement, based upon the stations' continuing broadcast of Columbia's television series "WHO'S THE BOSS?," "SILVER SPOONS," "HART TO HART," and "T.J.

HOOKER," after Columbia terminated its license agreements with the stations for non-payment of monthly license fees. When Columbia terminated its license agreements in October 1991, all three stations were between 150 and 365 days delinquent on their monthly license fee payments. More than $2 million was past due.

In December 1992, Columbia moved for partial summary judgment as to Feltner's liability for copyright infringement. The District Court granted the motion, finding Feltner:

> . . . is liable, under the doctrines of vicarious copyright infringement and contributory copyright infringement, for Six Hundred Sixty Four (664) separate infringements of Columbia's copyrighted works "WHO'S THE BOSS?", "SILVER SPOONS", "HART TO HART", "T.J. HOOKER" on the dates set forth in Columbia's [Proposed] Statement of Undisputed Facts. The amount of damages with respect to the aforesaid infringements shall be determined at trial.

Cert. Pet. App. at 25a-26a.

The Court of Appeals affirmed the summary judgment ruling, finding that: (1) Columbia's license termination was proper; (2) notwithstanding any continuing payment negotiations with Columbia, Feltner could not reasonably interpret Columbia's actions as anything but termination —Columbia's termination of the licensing agreements on October 17, 1991 "was clear and unequivocal;" and (3) Feltner's defenses—which were all based on Columbia's alleged 1990 promise to restructure payments for one of the stations—failed to raise triable issue of fact and therefore failed as a matter of law. Cert. Pet. App. at 5a-9a & 22a (The Ninth Circuit's opinion is officially reported at 106 F.3d 284 (9th Cir. 1997).) Feltner has not sought, nor has this Court granted, review of these rulings.[1]

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[1] Feltner misstates the facts by claiming that "Columbia *purported* to terminate the licensing agreement" and that he continued to broadcast Columbia's programs "relying on ongoing negotiations." Br. of Pet'r at 3 (emphasis added). The District Court found, and the Ninth Circuit affirmed, that Columbia's termination was not only "proper," but also "clear and unequivocal" and that Feltner's reliance on any on-going negotiations was "unreasonable." Cert. Pet. App. at 22a.

After summary judgment on liability was granted, Columbia dropped all claims, except its copyright infringement claim against Feltner, and elected Statutory Damages. Over Feltner's objection, the District Court ruled that all issues relating to the amount of Statutory Damages be tried to the court, and not a jury.

Prior to trial on Statutory Damages, Columbia and Feltner, *by stipulation*, expanded and refined the District Court's summary judgment finding of "664 separate infringements" by adding broadcasts which post-dated the filing of the summary judgment motion and by identifying the specific series episodes broadcast by each station on each date. Second Amended Pretrial Order, lodged 2/25/94, entered 3/2/94 ("Pretrial Order") at ¶ 6 & pp. 19-43.[2] The parties stipulated that between October 1991 and June 1993, the three television stations caused: (1) 984 infringing broadcasts of Columbia's programs; (2) a total of 440 episodes to be broadcast (if stations WNFT and WTVX were considered separate infringers). *Id.*[3]

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[2] This document appears chronologically, but unnumbered, in the Record.

[3] Feltner's statement that the question of "number of infringements" "remained for trial" Br. of Pet'r at 37-38, 39-40, is incorrect. The only question which remained at trial was, *not* the number of infringing broadcasts (*i.e., infringements*), but the number of copyrighted *works* infringed *by each infringer*. This issue turned on two questions: (1) whether each episode of a television series was a separate work (which therefore would support a separate award of Statutory Damages); and (2) whether WNFT and WTVX (which broadcast many of the same episodes of "WHO'S THE BOSS?") would be treated as two separate infringers (thereby supporting a separate Statutory Damage award

Prior to the trial, both Feltner and Columbia briefed the issue relating to the number of separate Statutory Damages awards which were appropriate under Section 504(c) based upon the stipulated facts. Both parties labeled this issue a "legal" question. Pl.'s Trial Br. (J.A. 13) at 1, 8-11; Defs.' Mem. of Contentions of Fact & Law of 2/9/94 (R. 263) at 9, 13-22. At the outset of the trial (prior to hearing any testimony), the District Court ruled that each episode was a separate work and that WNFT and WTVX were separate infringers. Thus, based upon the stipulated facts and these two rulings of law, the stations had infringed 440 works (supporting 440 separate awards of Statutory Damages). Trial Tr. of 3/15/94 (J.A. 13) at 10.

Following a bench trial, the District Court found that: (1) based upon Columbia's termination notices (which it had found to be "clear and unequivocal" on summary judgment), Feltner should have been "on notice that his continued broadcasts . . . [were] infringing;" (2) Feltner was repeatedly warned by Columbia and Feltner's own employees that the continued broadcasts were infringing; (3) Feltner's belief that the lawsuit was merely a collection tactic over a billing dispute was unreasonable given "Feltner's extensive experience in the business world" and Columbia's cessation of monthly billing and shipping new episodes ("defendant's [Feltner's] failure to send even a small payment on any of the license agreements [after termination] . . . belies defendant's claim that he thought termination was a mere billing dispute"); and (4) "over 94% of the episodes infringed (415 of 440 episodes) were broadcast after the Complaint . . . was filed. . . ." [4] Cert. Pet. App. at 22a-23a; J.A. 14-15.

against each for the broadcast of the same episode). Defs.' Mem. of Contentions of Fact and Law of 2/9/94 (R. 263) at 13-22; Pl's Trial Br. (J.A. 13) at 1, 8-11.

[4] This percentage was based on the parties' stipulation. Pretrial Order at ¶ 6 & pp. 19-43. The stations continued these infringing broadcasts until June 1993—eighteen months after the Complaint

Based upon these findings, the District Court found Feltner's conduct "willful" and awarded $20,000 for each of the 440 works infringed ($20,000 being the maximum amount the District Court could award *without* finding "willfulness" and *with* a finding that the infringements were "innocent"). 17 U.S.C. § 504(c). Subsequently, the District Court also awarded Columbia over $750,000 in costs and attorneys' fees. Cert. Pet. App. at 23a; J.A. 14-15.

The Ninth Circuit affirmed the District Court's rulings (other than costs and attorneys' fees) in all respects, including the two questions on which the District Court based its finding that 440 separate works had been infringed (and therefore that Columbia was entitled to 440 separate awards of Statutory Damages). On the first question of whether each episode was a separate work, the Ninth Circuit held—based upon undisputed facts—that "this case comes squarely within the holdings of *Gama Audio* and *Twin Peaks*" (which hold that each episode was a separate work).[5] On the second question, the Ninth Circuit held that the two stations which broadcast the same episodes of "WHO'S THE BOSS?" were separate infringers because: (i) "Feltner has not presented sufficient facts to develop a judicial estoppel argument;" and (ii) the fact that Feltner was jointly and severally liable for copyright infringement with each of the stations "does not convert the stations' separate infringements into one." Cert. Pet. App. at 14a-15a.

The Ninth Circuit, relying on *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), held that Feltner was not entitled to a jury trial on the amount of statutory damages under Section 504(c) of the Copyright Act—either as a matter

was filed and seven months after Columbia moved for summary judgment on Feltner's liability for copyright infringement. *Id.*

[5] Cert. Pet. App. at 16a. *See Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993); *Twin Peaks Prods. v. Publications Int'l*, 996 F.2d 1366 (2d Cir. 1993).

of statutory interpretation or Constitutional right. Cert. Pet. App. at 11a-12a. The Ninth Circuit, however, recognized the three different views among the Courts of Appeals as to a defendant's Seventh Amendment right to a jury trial: (i) the Second, Fifth and Eleventh (together with the Ninth) Circuits have held that there is no Constitutional right to a jury trial on any aspect of a Statutory Damages claim;[6] (ii) the Fourth and Eighth Circuits have held that the Seventh Amendment requires that all aspects of a Statutory Damages claim be tried to a jury;[7] and (iii) the Seventh Circuit has held that all factual issues (including whether the infringement is "willful" or "innocent") be tried to a jury, but the assessment of Statutory Damages within the appropriate statutory range is for the court.[8] Cert. Pet. App. at 12a.

Feltner has not sought review of the Ninth Circuit's rulings with respect to any issues except the right to a jury trial for Statutory Damage awards under Section 504(c) of the Copyright Act of 1976.

Statute at Issue

Section 504(c) of the Copyright Act of 1976, 17 U.S.C. § 504(c), governs Statutory Damages for copyright infringement.[9] As an initial matter, Congress labeled

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[6] *Cable/Home Communication v. Network Prods., Inc.*, 902 F.2d 829, 852-53 (11th Cir. 1990); *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. 1981); *Sid & Mary Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). The First Circuit also shares that view. *Chappell & Co. v. Palermo Café Co.*, 249 F.2d 77, 79-80 (1st Cir. 1957).

[7] *Cass Country Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635 (8th Cir. 1996); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119-21 (4th Cir. 1981).

[8] *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014-16 (7th Cir.), *cert. denied*, 502 U.S. 861 (1991).

[9] Section 504 is set forth in its entirety in the Appendix, as are remedy provisions of United States copyright statutes back to and including the 1790 Act.

this remedy "Statutory Damages," and Columbia uses that phrase as the term of art coined by Congress. Feltner, on the other hand, uses the term "statutory damages" to refer to any damages authorized by a statute. The difference reflects more than nomenclature.[10]

The Statutory Damages established in Section 504(c) have at least five distinctive characteristics.[11]

First, Statutory Damages are available only as an alternative to the actual damages and profits authorized in Section 504(b)—not as an enhancement to, or minimum guarantee of, an actual damages award. Other federal statutes protect intellectual property and other rights by allowing departure from actual damages only to increase those damages in appropriate circumstances, either through a specified multiplier or through punitive damages. *See, e.g.*, 35 U.S.C. § 284 (authorizing actual damages in an amount no "less than a reasonable royalty," plus interest and costs, and the court may treble actual damages for patent infringement).

Second, the copyright owner is authorized to elect Statutory Damages rather than recovery of actual dam-

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[10] Indeed, Feltner's use of this term is misleading as well as inaccurate because it assumes resolution of the very issue before the Court by equating "Statutory Damages" under Section 504(c) with the civil penalties provided by statutes prior to the 1976 and 1909 Copyright Acts. Neither Congress in these prior statutes nor courts interpreting that statutory language—including this Court—have used the term "statutory damages" to refer to these pre-1909 penalties. Such a generic reference, moreover, fails to distinguish between types of damages authorized under the same statute, such as the actual damages and profits provided in Section 504(b) and the alternative "Statutory Damages" established in Section 504(c). Under Feltner's nomenclature, both Sections 504(b) and 504(c) are "statutory damages."

[11] Since the passage of the 1976 Act, Congress has established variations on Statutory Damages as a remedy for infringement of other types of intellectual property, but these statutes often vary significantly from Section 504(c). *See* 15 U.S.C. § 1117(a) & (c) (1996) (trademark infringement); 17 U.S.C. § 911(c) (1984) (infringement of semiconductor chips).

ages "at any time before final judgment." This provision is unique both for who may make the election and when the election can be made. Rather than a judicial and/or jury determination of an appropriate remedy based solely on the pleadings and factual record as is the case in other types of claims, the copyright owner in an infringement action may unilaterally select among two mutually exclusive remedies. That election, moreover, is not required when the complaint is filed or even prior to trial but may be made *at any time* up until the court renders its final judgment, including after a jury has rendered its verdict on actual damages and been dismissed.

Third, Congress has imposed express limitations on the amount of Statutory Damages, creating a wide range within which the award must fall. Section 504(c)(1) provides an initial range of "not less than $500 nor more than $20,000" per work infringed—a range in which the highest level is 40 times the lowest amount (the "Initial Range"). A court finding of willfulness ("willful infringement") may increase the maximum award to $100,000 (200 times the minimum). A finding that the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright ("innocent infringement")," on the other hand, authorizes the court to decrease the minimum award to $200, resulting in a range where the maximum possible award is 100 times the minimum. 17 U.S.C. § 504(c)(1). Other federal civil statutes establish no such ranges, rarely limiting damages available to injured parties—and then only to guarantee a minimum recovery. *See, e.g.,* 35 U.S.C. § 284 (authorizing minimum recovery of compensatory damages for patent infringement representing no "less than a reasonable royalty" plus interest and costs).

Fourth, other than determinations of "willful" or "innocent" infringement, the statute provides no guidelines or criteria for assessing the amount of damages within the applicable range. The statute grants the court the *discretion* (but not the obligation) to expand the Initial Range upward to a maximum of $100,000 for each work

infringed by each willful infringer, or downward to a minimum of $200 for innocent infringement. Thus, findings of "willfulness" or "innocence" may have no effect on the final Statutory Damages award. The court retains the discretion to assess the damages award anywhere within the Initial or expanded ranges. Here, for example, the District Court found that Feltner's infringement of Columbia's copyrighted works was "willful" but nevertheless did not exercise its discretion to increase the Initial Range. Rather, the court awarded Statutory Damages of $20,000 per work infringed—the maximum permitted for *nonwillful* infringement. Cert. Pet. App. at 23a.

Fifth and finally, the statute precludes an award of Statutory Damages if the infringer is a nonprofit educational or public broadcasting entity or representative and "believed and had reasonable grounds for believing that his or her use of the copyright was a fair use." The copyright owner may be no less damaged by such infringements, but Congress has determined that public policy is best served by precluding an award of Statutory Damages under such circumstances. Congress has taken an additional step for such defendants and shifted the burden of proof from the infringer to the copyright owner. Good faith is presumed, forcing the copyright owner to bear the burden to prove the infringer did not actually believe that its use of the work was a fair use. H.R. Rep. No. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779. Other federal civil statutes do not preclude an award of damages based on the identity of the defendant. The statute at issue before the Court thus presents the Court with a unique remedy.

SUMMARY OF ARGUMENT

Congress created Statutory Damages in 1909 as a means of enabling judges to exercise discretion within prescribed limitations to remedy copyright infringement in circumstances when actual damages and lost profits are inadequate. The statute allows the court to balance multi-

ple competing interests—including compensation to the copyright owner, deterrence of future infringements, vindication of the statutory policy, and the identity and culpability of the infringer—to fashion an award that is fair to all parties, not solely compensatory to a copyright owner who can prove the existence and extent of economic loss. Statutory Damages thus are not just any form of monetary relief authorized by statute, as Feltner uses the term, but are a specific alternate remedy authorized by Congress to accommodate and promote the goals of the Copyright Act. Neither Congress nor the Constitution requires that such relief be determined and awarded by a jury.

Nothing in the language or legislative history of the Copyright Act of 1976 in general, or 17 U.S.C. § 504(c) in particular, indicates any intent to authorize a jury assessment of Statutory Damages. To the contrary, the ordinary meaning of the statutory language demonstrates Congressional intent to enable only the judge to make such an award. The ordinary legal meaning of "court" is synonymous with "judge," and Congress consistently uses the terms "court" and "court in its discretion" throughout the statute in a context that unquestionably refers to the judge and judicial functions. No court has interpreted the 1976 Act to allow a jury determination of Statutory Damages, and this Court has construed the Congressionally-authorized discretion to assess such damages as necessarily judicial. The statute, therefore, authorizes only judges, exercising judicial discretion, to award Statutory Damages.

The Seventh Amendment to the United States Constitution also does not require a jury determination of Statutory Damages. Such a remedy is equitable by its nature, and as awarded in this case, is properly within the province of the judge. Statutory Damages have no historical precedent prior to the Twentieth Century. The sole legal remedy available for infringement of a published copy-

righted work under the 1790 Act—and the principal remedy for a century thereafter—was a per-copy civil penalty in an amount fixed by Congress, half of which was paid to the government. This historical remedy bears no resemblance to Statutory Damages. Statutory Damages were created in the Copyright Acts of 1909 and 1976 as an alternative to actual damages and are assessed by the court in the exercise of its discretion, within prescribed ranges, and paid entirely to the copyright owner. Such a quintessentially equitable remedy—which is not dependent on proof of injury or findings of outrageous conduct and may be less than compensatory under appropriate circumstances—is not within the purview of the Seventh Amendment's jury trial requirements.

ARGUMENT

I. THE COPYRIGHT ACT PLAINLY REQUIRES THAT STATUTORY DAMAGES BE AWARDED EXCLUSIVELY THROUGH THE EXERCISE OF JUDICIAL DISCRETION.

"Before initiating the inquiry into the applicability of the Seventh Amendment, '[w]e recognize, of course, the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [Constitutional] question may be avoided." ' " *Tull v. United States*, 481 U.S. 412, 417 n.3 (1987) (quoting *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974)).[12] Nothing in the language or legislative history

[12] Feltner misconstrues the Court's inquiry by placing undue emphasis on the phrase "fairly possible." As this Court's prior decisions make clear, the Court engages in an analysis of the statutory language—and if that language is ambiguous, in a review of the legislative history—according to well-accepted principles of statutory construction. The Court may avoid the Constitutional question only if it finds Congressional intent to construe the statute in a manner that would avoid that issue. *See, e.g., Tull*, 481 U.S. at 417 n.3 ("Nothing in the language of the Clean Water Act or

of Section 504(c) or the Copyright Act as a whole implies any Congressional intent to provide a jury determination of Statutory Damages. To the contrary, the ordinary meaning of the statutory language demonstrates Congressional intent to authorize only the trial judge to award Statutory Damages. Accordingly, the Court cannot avoid but "must answer the Constitutional question presented." *Id.*

A. The Language of the Statute Demonstrates Congressional Intent to Preclude Jury Assessment of Statutory Damages.

Statutory construction begins "with the language of the statute." *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). Where the statutory language is unambiguous or its meaning plain, the inquiry ends. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997). The words used by Congress must be given their "ordinary or natural meaning," and the Court will "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Id.* More specifically, "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911).

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its legislative history implies any congressional intent to grant defendants the right to a jury trial during the liabilities or penalty phase of the civil suit proceedings"). The Court's use of the term "fairly possible," therefore, neither directs nor implies a diluted statutory construction analysis to avoid consideration of Constitutional issues.

Section 504(c) of the Copyright Act provides for Statutory Damages "in a sum not less than $500 or more than $20,000 as the *court* considers just." 17 U.S.C. § 504 (c)(1) (emphasis added). The *"court in its discretion"* may increase the range to $100,000 upon a finding of willfulness, or the *"court i[n] its discretion"* may decrease the range to $200 for innocent infringement. *Id.* § 504 (c)(2) (emphasis added). Congress' use of the terms "court" and "court in its discretion" unambiguously demonstrates an intent to authorize only the judge to award Statutory Damages. This Court has repeatedly recognized, both expressly and impliedly, that the words "court" and "judge" "have been used interchangeably." *In re United States*, 194 U.S. 194, 196 (1904); *see, e.g., Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1387 (1996) (holding "that the construction of a patent . . . is exclusively within the province of the court," *i.e.*, the judge). Congress also habitually uses "court" and "judge" interchangeably—indeed, Congress often contrasts "jury" with "court." *See, e.g.*, 35 U.S.C. § 284 (establishing in the context of patent infringement that "[w]hen the damages are not found by a jury, the court shall assess them").

Congress' use of the terms "court" and "court in its discretion" in the context of the statute further solidifies Congressional intent to authorize only judicial discretion in the award of Statutory Damages. Every other reference to "court" in the Copyright Act chapter governing infringement and remedies (Chapter 5) unquestionably refers to the judge.[13] The only other reference to "court

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[13] *See* 17 U.S.C. § 502 (the "court . . . may . . . grant temporary and final injunctions"); *id.* § 503 ("the court may order the impounding . . . of all copies" and "[a]s part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies"); *id.* § 505 ("the court in its discretion may allow the recovery of full costs" and "the court may also award reasonable attorney's fee"); *id.* § 506(b) ("the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition

in its discretion" in Chapter 5 is in the context of an award of costs and attorneys' fees—the exclusive province of the trial judge. 17 U.S.C. § 505. In sharp contrast, the statute scrupulously avoids the use of the term "court" in connection with an award of actual damages. *See id.* § 504(b).

No court that has construed the 1976 Act has concluded that Congress intended to allow a jury determination of Statutory Damages. Even the minority of courts that believe the Seventh Amendment requires such a jury determination agree that the Copyright Act is not susceptible of an interpretation that would avoid the Constitutional question. *See, e.g., Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 641 (8th Cir. 1996). Courts reviewing the Congressionally authorized discretion to award Statutory Damages, moreover, have concluded that such discretion can only be exercised properly by judges. *See, e.g., Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1177-78 (9th Cir. 1977); *Raydiola Music v. Revelation Rob, Inc.*, 729 F. Supp. 369 (D. Del. 1990). As this Court observed in the context of the predecessor of Section 504(c) (Section 25(b) of the Copyright Act of 1909), "[t]he necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide *judicial* discretion within limited amounts conferred by this statute." *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952) (emphasis added). Congress unambiguously established such exclusive judicial discretion in Section 504(c).

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of all infringing copies"); *id.* § 508 (requiring clerks to provide Register of Copyrights with "a copy of the order or judgment together with the written opinion, if any, of the court"); *id.* § 510(b) (providing in the context of cable systems, "the court may decree that . . . the cable system shall be deprived of the benefit of a compulsory license").

The need for exclusively judicial discretion is underscored by Congress' authorization to copyright owners to elect Statutory Damages "at any time before final judgment is rendered . . . ." 17 U.S.C. § 504(c). Courts consistently interpret this authorization as enabling the copyright plaintiff to elect Statutory Damages even after a jury has returned a verdict on liability and an award of actual damages. *See, e.g., Jordan v. Time, Inc.*, 111 F.3d 102 (11th Cir. 1997); *Glazier v. First Media Corp.*, 532 F. Supp. 63, 68 (D. Del. 1982). This provision demonstrates Congressional intent to provide a judicially determined remedy as an alternative to actual damages assessed by the jury. Congress is not reasonably likely to have intended that a jury—having just made an actual damages determination based on evidence of the existence and extent of economic injury to the plaintiff and economic benefit to the defendant—would be required to reassemble after having been dismissed and to disregard their prior award and develop a different award, using entirely different (and unspecified) criteria. That result would defy common sense, as well as the ordinary meaning of the statutory language. Statutes are not susceptible of such an interpretation. *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994). Congress, therefore, unambiguously intended that judges, rather than juries, assess Statutory Damages.

Feltner disagrees, contending that the word "court" generally includes judge and jury as understood in the "common parlance" reflected in two dictionary definitions. Such a position is fundamentally flawed. "Court" is a legal term, not simply a word of "common parlance" in the English language. "Rather than using terms in their everyday sense, '[t]he law uses familiar legal expressions in their familiar legal sense.'" *Bradley v. United States*, 410 U.S. 605, 609 (1973) (quoting *Henry v. United States*, 251 U.S. 393, 395 (1920)). The well-established familiar legal sense of the term "court" is

"judge," as discussed above, and the dictionaries Feltner quotes do not even purport to define "court" in its familiar legal sense.[14] Feltner cannot overcome the familiar legal understanding that the word "court" refers to judges—much less Congress' consistent use of the term in that manner in the Copyright Act—by quoting general colloquial dictionary definitions.

Nor has this Court ever found that statutory references to "court" or "court in its discretion" reflect Congressional intent to guarantee a jury determination. Feltner attempts to rely on *Curtis v. Loether*, 415 U.S. 189 (1974), but the Court in that case expressly did not reach the issue of statutory interpretation. The Court recognized that its first obligation was to ascertain whether the Constitutional issue may be avoided but nevertheless found in that case that "the necessity for jury trial is so clearly settled by our prior Seventh Amendment decisions that it would be futile to spend time on the statutory issue . . . ." *Id.* at 192 n.4. The Court did not even discuss, much less express any opinion on, the use of "court" in the statute. The Court's observation that "[b]oth petitioner and respondents have presented plausible arguments from the wording and construction" of the statute thus indicates nothing more than the existence of a legitimate legal issue and, as this Court has frequently stated, that statutory terms must be evaluated in context with the express purpose of divining Congressional intent.

Feltner's reliance on *Lorillard v. Pons*, 434 U.S. 575 (1978), is similarly misplaced. The Court in that case never concluded that the term "court" includes a jury.

[14] Feltner also selectively quotes from the very dictionaries he cites. Included among the many definitions in both of these dictionaries are definitions that equate "court" and "judge," while neither makes any reference to the inclusion of a jury. *See* Webster's Third New International Dictionary 522 ("a judge or judges sitting for the hearing or trial of cases"); Webster's Ninth New Collegiate Dictionary 299 ("a judge or judges in session").

To the contrary, the primary ground on which the Court concluded that the Age Discrimination in Employment Act ("ADEA") provided for a jury trial was Congress' express "directive that the ADEA be enforced in accordance with the 'powers, remedies, and *procedures*' of the FLSA [Fair Labor Standards Act]," and "it was well established that there was a right to a jury trial in private actions pursuant to the FLSA." *Id.* at 580 (quoting 29 U.S.C. § 626(b)) (emphasis added by the Court). The Court "buttressed" this conclusion with "an examination of the language Congress chose to describe the available remedies under the ADEA." *Id.* at 583. The Court ignored the single reference to "court" and focused entirely on the repeated use of the term "legal" in the remedial provisions:

> Section 7(b), 29 U.S.C. § 626(b), empowers a court to grant "*legal* or equitable relief" and § 7(c), 29 U.S.C. § 626(c) authorizes individuals to bring actions for *"legal"* or equitable relief" (emphasis added). The word "legal" is a term of art: In cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial. . . . We can infer, therefore, that by providing specifically for "legal" relief, Congress knew the significance of the term "legal," and intended that there would be a jury trial on demand to "enforc[e] . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation.

Id. (emphasis in the original) (quoting 29 U.S.C. § 626(b)). The Court's decision in *Lorillard* thus stands only for the uncontested proposition that a cause of action for legal relief must be tried to a jury and that Congress, by referencing another statute that provided for jury trials and by using the term "legal relief" in the ADEA, expressed an intent to provide a jury trial to enforce legal liabilities arising under the ADEA.

The statutory language in the 1976 Copyright Act in general, and in Section 504(c) in particular, bears no relationship to the language before the Court in *Curtis* or *Lorillard*. Congress did not empower the "court" to award "legal" relief in actions for copyright infringement, nor did Congress even use the term "court" in connection with an award of actual damages under Section 504(b). Rather, Congress authorized, as an alternative to actual (*i.e.*, legal) damages, a remedy that necessitates the exercise of discretion not only to award undefined damages within a statutory range, but to expand that range under certain circumstances at the court's option—a discretion that this Court has characterized as necessarily judicial.[15] Section 504(c), therefore, unambiguously precludes a jury determination of Statutory Damages.

B. Other Means of Ascertaining Congressional Intent Do Not Contradict the Statutory Language.

"Legislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808 n.3 (1989). The language of Section 504(c), particularly when viewed in the context of the Copyright Act as a whole (and contrasted with 504(b)), requires that the judge, rather than the jury, must exercise discretion to assess Statutory Damages. Proceeding from the false predicate that Section 504(c) is facially ambiguous, Feltner unsuccessfully attempts to use other aids to statutory construction to support his position.

[15] See *F.W. Woolworth*, 344 U.S. at 232; *Douglas v. Cunningham*, 294 U.S. 207, 209-10 (1935). Feltner contends that providing for discretion does not, standing alone, preclude a jury determination, but the proper inquiry is not to consider terms in isolation. Rather, the Court reviews "discretion," like "court," in the context of its usage in the statute. Congress consistently uses "court" and "court in its discretion" throughout the Copyright Act to refer exclusively to judicial functions and judicial discretion, demonstrating an unambiguous intent to authorize judges alone to award Statutory Damages.

The scant legislative history and events leading up to enactment of the 1976 Copyright Act, however, fail to shed any meaningful, much less decisive, light on the issue before the Court.

The legislative history of the Copyright Act of 1976 does not directly address the issue before the Court, but the House Committee on the Judiciary Report describes Section 504(c) in the same terms as those used in the statute itself: as the obligation of the court, *i.e.*, the judge. *See, e.g.*, H.R. Rep. No. 94-1476, at 162 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5778 ("the plaintiff's election to recover statutory damages may take place at any time during the trial before the *court* has rendered its final judgment") (emphasis added); *see generally id.* at 161, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5777 (describing the basic goals of Section 504 in similar terms).[16]

Judicial interpretation of the prior law is also inconclusive, but is more inclined to support, rather than contradict, the statutory language. Few courts addressed whether the prior law (the Copyright Act of 1909) provided a jury determination of Statutory Damages (then known as "in lieu of" damages), and those courts were divided on the issue.[17] This Court had not considered the

[16] Feltner cites a single reference in this report to support his position that the legislative history uses the term "court" to include juries. In that provision, the House Committee states that the statute limits recovery of profits to those attributable to the copyrighted work and requires the "court" to make an apportionment among such profits and unrecoverable profits caused by different factors. A determination of recoverability of profits, however, is a question of law, and the Committee Report states nothing more than the court's legal responsibility to exclude profits not attributable to copyright infringement. At best, the use of "apportionment" is ambiguous, and it does not impact Congress' use of "courts" in either the Copyright Act or the remainder of the legislative history.

[17] *See Chappell & Co. v. Palermo Café Co.*, 249 F.2d 77, 79-80 (1st Cir. 1957) (no right to jury trial); *Shapiro, Bernstein & Co. v. 4636 S. Vermont Avenue, Inc.*, 367 F.2d 236, 239-40 (9th Cir. 1966) (adopting district court conclusion that Statutory Damages

issue directly, but had characterized the remedy as necessarily requiring the exercise of judicial discretion. *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952); *Douglas v. Cunningham*, 294 U.S. 207, 209-10 (1935). Congress, moreover, revisited Section 504(c) in 1988, revising the ranges within which an award of Statutory Damages may be assesed but making no other changes, despite additional judicial decisions uniformly interpreting the statute as not giving rise to a jury determination of Statutory Damages. Pub. L. 100-568, § 10(b), 102 Stat. 2860 (1988).[18] If any presumption is appropriate, therefore, Congress can only be presumed to have been aware that courts predominantly viewed existing law as precluding jury determination of

are "the equitable substitute for cases which presented the impossibility of proof as to damages and profits"); *Mail & Express v. Life Publ'g Co.*, 192 F. 899 (2d Cir. 1912) (statute permits jury trial); *Cayman Music Ltd. v. Reichenberger*, 403 F. Supp. 794 (W.D. Wis. 1975) (no right to jury trial). The only other reported decision was *Chappel & Co. v. Cavalier Café*, 13 F.R.D. 321 (D. Mass. 1952), which concluded that a jury trial was required, but which was implicitly overruled by the First Circuit's decision in *Chappell & Co. v. Palermo Café*. Feltner focuses on *Mail & Express*. That case, however, holds only that the statute "permits" a judge to refer the matter to a jury (and not that a jury is required). 192 F. at 901. Feltner also contends that the 1976 Congress must be presumed to have relied solely on this decision and to have known that the contrary decision in *Chappelle & Co. v. Palermo Café* was "infirm." Even if these two decisions were the only relevant precedent (which they are not), Feltner cites no authority for presuming that Congress knows which of two inconsistent circuit court decisions is correct. Congress is far more likely to have concluded that the more numerous and recent decisions—including this Court's decisions—reflected prevailing judicial interpretation of the existing statute.

[18] *See, e.g., Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. 1981); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1177-79 (9th Cir. 1977); *see generally Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119-21 (4th Cir. 1981) (finding Constitutional right to jury trial but no such statutory right).

Statutory Damages and to have continued to authorize only judges to provide such relief.[19]

Feltner maintains that Statutory Damages are the result of an unbroken chain of damages statutes that involved jury determinations and thus Congress must be presumed to have intended to grant a jury trial when enacting Section 504(c). The historical emergence of Statutory Damages is discussed in greater detail in Section II A, *infra.*, and that history demonstrates that the 1909 Act was not merely an expansion of existing damages to all forms of copyright infringement, as Feltner contends, but established a novel form of equitable relief that was entirely distinct from the damages authorized under prior statutes.[20] The "historical background" of the 1976 Act pro-

[19] Feltner cites the legislative history of the Semiconductor Chip Protection Act of 1984 as "worth noting," but the stray reference to the Copyright Act by a Congressional committee reporting on entirely different legislation, by a different Congress, acting eight years after the statute at issue, has no probative value whatsoever. *See, e.g., Cass County Music*, 88 F.3d at 641 n.3. Even if such future history were instructive, the legislative history of the Anti-counterfeiting Consumer Protection Act of 1996 reached the opposite conclusion, providing that a remedy substantially similar to Statutory Damages (Pub. L. 104-153, § 7, 110 Stat. 1386 (codified as 15 U.S.C. § 1117(c) (1996))) allows "civil litigants the option of obtaining discretionary, *judicially imposed damages* in trademark counterfeiting cases, instead of actual damages." S. Rep. No. 104-177 (1995), pt. V(7), *available in* 1995 WL 709282 (emphasis added). The legislative history Feltner quotes, moreover, counsels caution in conclusively presuming that all members of Congress are aware of judicial interpretation of existing statutes. This Congressional committee apparently was unaware in 1984 that every court to have interpreted Section 504(c) prior to 1984 concluded that it did not require a jury trial. *See, e.g., Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. 1981); *see also Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1177-79 (9th Cir. 1977) (interpreting substantially similar 1909 Act).

[20] Feltner and his amicus cite passages from the drafting history of the 1909 Act that "suggest" the ranges for Statutory Damages

vides no basis on which Congress could be presumed to have intended to require a jury determination of Statutory Damages. The Court, therefore, cannot avoid the Constitutional issue.

II. THE SEVENTH AMENDMENT DOES NOT REQUIRE THAT A JURY DETERMINE THE AMOUNT OF, OR LIMITATIONS ON, AN AWARD OF STATUTORY DAMAGES UNDER SECTION 504(c).

Congress established Statutory Damages as an equitable remedy, administered through the exercise of judicial discretion when the available remedy at law is inadequate, to do justice under the circumstances of a particular case. The Court, therefore, must determine whether the Seventh Amendment requires that an award of Statutory Damages be made by a jury, rather than by the court as required by statute. The Court's "historical test" for determining whether a statute gives rise to a right to jury trial under the Seventh Amendment requires the Court to inquire:

> first, whether we are dealing with a cause of action that either was tried at law at the time of the Founding or is at least analogous to one that was. . . . If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.

Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1389 (1996). As applied here, inquiry under the first

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reflected limits on jury discretion, but this history can be interpreted just as easily to support the view that an award of Statutory Damages by a judge was necessary to address juries' inherent biases and practical limitations. See Br. of Pet'r at 18 n.6; Br. of Amicus Abrams at 21. This legislative history is not only ambiguous but affords little, if any, insight into Congressional intent in the 1976 Act. This drafting history bears no necessary relationship to Congressional intent when enacting either the 1909 or 1976 statute. The quoted speakers, moreover, were not even members of Congress.

prong demonstrates that Statutory Damages are an equitable, not legal, remedy (Section II. A, *infra.*). Even if Statutory Damages were considered to be legal relief, the second prong examination supports the position that no jury would be required to preserve the substance of any common law right as it existed in 1791 (Section II. B, *infra.*). The Seventh Amendment thus does not preclude Congress from authorizing judges alone to award Statutory Damages.

A. An Action for Copyright Statutory Damages Is Equitable and Thus Does Not Give Rise to a Right to Jury Determination.

The first prong of the Court's Seventh Amendment two-prong inquiry requires an examination of the historical nature of the action, but that analysis is limited by the circumstances of this case. Feltner's liability for hundreds of copyright infringements was established as a matter of law on summary judgment. Cert. Pet. App. at 25a-26a. The number of Columbia's works that Feltner infringed was determined as a matter of law based on stipulated facts. *Id.* at 26a, 34a; *see infra* Section II.B.3. Although the District Court found that Feltner's conduct was willful, that finding was compelled by the District Court's rejection of Feltner's defenses to liability on summary judgment, and the District Court did not exercise the authorized discretion to award an amount outside of the Initial Range ($500-$20,000)—the only applicability of a willfulness determination. *Id.* at 23a; *see infra* Section II.B.2. The sole issue before this Court, therefore, is whether the Seventh Amendment requires that a jury determine the *amount* of Statutory Damages to be awarded within the Initial Range.

The Court's historic test requires consideration of two factors:

> To determine whether a statutory action is more similar to cases that were tried in courts of law than

> to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.

Tull v. United States, 481 U.S. 412, 417-18 (1987).[21] As the Court emphasized in *Tull*, characterizing the relief sought is the most important aspect of the inquiry in this case. *See id.* at 421. The pre-merger custom (first factor) was to bring copyright infringement actions in either courts of equity or courts of law depending on the relief sought, thus placing the emphasis on the second factor—the nature of the relief. Under that second factor, Statutory Damages did not exist until 1909 and were designed by Congress to provide an alternative to inadequate actual damages that allows the court, through the exercise of discretion within a defined range, to achieve a fair and balanced result to both parties, rather than blindly compensating one party and punishing the other—in short, an equitable remedy for which no right to jury determination arises.

1. *The Historic Nature of the Cause of Action Is Not Probative of the Issues Before the Court.*

The Court's first inquiry generally is to "compare the statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity." *Tull*, 481 U.S. at 417. The Court itself has characterized this inquiry as "an 'abstruse historical' search," *id.* at 421 (quoting *Ross*, 396 U.S. at 538 n.10),

[21] The Court has also considered a third factor, "the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law." *Id.* at 418 n.4; *accord Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). This factor, however, does not impact the analysis of the issue before this Court under the circumstances of this case.

and that observation is particularly appropriate in this case, where the nature of the underlying action is not even at issue. Feltner's liability for 664 copyright infringements was established on summary judgment, affirmed by the Ninth Circuit, and is not in dispute in this Court. Cert. Pet. App. at 5a-9a. The Court, therefore, need only consider the nature of Statutory Damages, not the nature of an action to determine liability for copyright infringement. *See Tull*, 481 U.S. at 425-27 (determining whether the Seventh Amendment required a jury determination of the statutory remedy separately from the determination of liability).

Even were the Court to examine the nature of the initial cause of action, history provides no ready answer because a copyright owner in 1791 could seek relief for copyright infringement in *either* a court of law or a court of equity depending on the remedy sought. *See, e.g., Donaldson v. Becket*, 4 Burr. 2408, 2409, 98 Eng. Rep. 257, 258 (H.L. 1774) (Eyre, J.) (confirming the existence of a "remedy in equity upon the foundation of the statute, independent of the terms and conditions prescribed by the statute, in respect of penalties enacted thereby"); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 679 (1834) (Thompson, J., dissenting) (noting "the constant practice in chancery to grant injunctions to restrain printers from publishing the works of others, which practice can only be sustained on the ground that the penalties given by the statute are not the only remedy that can be resorted to").

Feltner collapses the nature of the cause of action and the nature of the remedy into a single factor by assuming that Statutory Damages under Section 504(c) are the same as the civil penalty for copyright infringement authorized under statutes enacted prior to 1791, and then characterizing the cause of action as one to recover that remedy. The Court must determine the nature of the remedy under the second factor of its inquiry, including whether Statutory Damages under current law are analo-

gous to damages specified in earlier copyright statutes. Feltner cannot claim that the first factor is determinative by assuming a favorable resolution of the second factor.

The simple historical facts are that a copyright owner seeking redress for copyright infringement could bring an action in a court of law for legal remedies or a bill in equity for equitable relief. An attempt to find an historical precedent to a claim for copyright infringement, therefore, is neither fruitful nor probative of the issue before the Court.

2. *Statutory Damages Are a Quintessentially Equitable Remedy.*

The Court has emphasized that "characterizing the relief sought is 'more important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." *Tull*, 481 U.S. at 421 (quoting *Curtis v. Loether*, 415 U.S. at 196). This is particularly true of Statutory Damages. This remedy was created and designed by Congress in the Copyright Act of 1909 (and later revised in the 1976 Act) to provide equitable relief for copyright infringement. Prior statutes specified penalties and minimum recovery of actual damages, but made no attempt to provide an alternative to these legal remedies or invest the court with the discretion authorized in Section 504(c). Had Statutory Damages existed in their present form at the time the Seventh Amendment was adopted, basic principles of law and equity would have required that any such award be within the exclusive province of the courts of equity to award.

a. No Historical Equivalent for Statutory Damages Existed Prior to 1909.

The Court's examination of the nature of the remedy in prior decisions has focused on analogizing the statutory remedy to remedies historically available at common law

or in equity. Statutory Damages, however, have no historical parallel. Nothing like this remedy was available—either at law or in equity—until 1909, notwithstanding the fact that Congress and the British legal system had specified a damages remedy by statute since long before the Seventh Amendment was adopted.

The first federal copyright statute in the United States was enacted in 1790, the year before the Seventh Amendment was adopted, and provided as a remedy for infringement of copyrights in printed materials that "every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, . . . the one moiety thereof . . . to and for the use of the United States. . . ." Act of May 31, 1790, 1 Stat. 124. This statute established a civil penalty for copyright infringement in a fixed amount, half of which would be collected by the government with the other half paid to the copyright owner.[22] As was true of the English Statute of Anne from which the American law was copied, 8 Anne ch. 19 (1710), the statute provided the sole remedy at law for copyright infringement. *E.g.*, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

The remedy provided by the 1790 statute bears no resemblance to modern Statutory Damages. The 1790 statutory remedy was a one-size-fits-all civil penalty, in a single, invariable amount per copy, without any exercise of discretion or ability to consider the nature or extent of injury, lost profits, or the culpability or identity of the

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[22] The 1790 statute also imposed liability for publishing a manuscript, *i.e.*, an unpublished work, requiring the infringer "to pay to the said author or proprietor all damages occasioned by such injury . . . ." *Id.* The statute thus differentiated between unpublished works, for which the copyright owner could collect actual damages, and published works, the infringement of which could be remedied only by fixed civil penalty.

infringer. In short, Congress, rather than either the judge or the jury, determined the amount of money to be awarded for copyright infringement under the statute, and then collected half of it.[23] Subsequent statutes maintained the same fixed penalty structure of monetary relief for copyright infringement established in the 1790 Act. See Act of April 29, 1802, 2 Stat. 171 (extending copyright protection to additional categories of works and requiring infringers to "forfeit one dollar for every print," half of which to be paid to the federal government); Act of February 3, 1831, 4 Stat. 36 (same, with prescribed remedy of "fifty cents for every such sheet" in the infringer's possession).[24]

Congress prescribed the remedy for copyright infringement at law, but courts of equity initially continued to provide alternative relief. *See Stevens v. Gladding*, 58 U.S. (17 How.) 447 (1854). Congress, however, as it earlier had done with legal remedies, soon assumed the power to prescribe equitable relief and granted jurisdiction to federal courts to provide such remedies. Act of February 15,

[23] The rigidity of this remedy is underscored by the statutory requirement that recovery was "by action of debt." Act of May 31, 1790, 1 Stat. 124 § 2. An action of debt was a legal claim for a fixed amount of money, conceived "as a property claim, analogous to a claim for specific chattel, with the specific sum of money standing in the place of the chattel." 1 D. Dobbs, *Law of Remedies*, § 4.2[3], at 577 (2d ed. 1993). In other words, such an action existed where "a sum certain was due to the plaintiff, or a sum which can readily be reduced to a certainty . . . ." *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 542 (1871). No action for debt, therefore, could be maintained where the sum was indeterminate. By limiting recovery to actions at debt, these statutes also limited the available remedy to a sum certain (either actual damages or a fixed penalty), in marked contrast to the discretionary Statutory Damages authorized in Section 504(c).

[24] These statutes also authorized fixed civil penalties of $100, half of which was to be paid to the United States, for infringing works under a false claim of authority, and retained actual damages as the remedy for infringement of unpublished manuscripts. *Id.*

1819, 3 Stat. 481. A court of equity was constrained by the remedies authorized in the statute (and could not award the statutory civil penalties), but equity courts could issue injunction and order an accounting and disgorgement of an infringer's profits. *See Stevens*, 58 U.S. (17 How.) 447; *Chapman v. Ferry*, 12 F. 693 (C.C.D. Ore. 1882); *Social Register Ass'n v. Murphy*, 129 F. 148 (C.C.D.R.I. 1904).

Not until 1856 did Congress depart from this structure of monetary remedies available at law for copyright infringement, and then did so only to authorize actual damages for infringement of dramatic works. The 1856 statute extended copyright protection for the first time to presentations of "dramatic composition," and specified payment for unauthorized performances of "damages in all cases to be rated and assessed at such sum not less than one hundred dollars for the first, and fifty dollars for each subsequent performance, as to the court having cognizance thereof shall appear to be just . . . ." Act of August 18, 1856, 11 Stat. 138.[25] This remedy bears only a superficial and misleading resemblance to some of the aspects of Statutory Damages under the 1976 Act—the 1856 statute authorized only a minimum recovery of *actual* damages and was the sole form of statutory legal relief available. As this Court made clear in the context of later statutes that incorporated this remedy, "the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery *upon proof of greater damage in those cases where such proof can be made.*" *Brady v. Daly*, 175 U.S. 148, 154 (1899) (emphasis added). The damages specified for dramatic works in the 1856 statute thus represented actual damages with a floor, and the ability of the "court" to provide a remedy as "shall appear to be just" was strictly limited to awarding actual damages in excess of the statutory mini-

[25] Owners of other copyrighted works continued to recover only the previously fixed civil penalties for infringement.

mum *only* when such an award was justified by proven injury.

The 1870 revisions similary authorized the copyright owner of a book to obtain "such damages as may be recovered in a civil action" (*i.e.*, actual damages) while retaining actual damages with a floor for dramatic works and fixed civil penalties for infringement of other copyrighted works. Act of July 8, 1870, 16 Stat. 212.

In 1895, Congress amended the existing statutes. The statutes continued to maintain a fixed civil penalty calculated on a per sheet or per copy basis, but the total of those calculations recoverable for infringement of a photograph was limited to "not less than one hundred dollars, nor more than five thousand dollars," and for infringement of a painting, statue, or other work of fine art to "not less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States." Act of March 2, 1895, 28 Stat. 965. The 1895 statute represents the first statutory range for copyright damages established by Congress, but the range did not alter how the civil penalty was calculated. It merely constrained the *total* of the recovery permissible based on those per-copy calculations. Congress authorized no discretion in determining the amount within that range but simply established a minimum total penalty and capped the total at $5,000 or $10,000 (regardless of the number of copies), depending on the type of work infringed.

The 1909 amendments to the copyright statutes introduced what are now known as Statutory Damages. The 1909 Act represented a major revision of existing copyright law, minimizing the differentiation between types of copyrighted works and providing the same remedies for infringement of "the copyright in any work protected under the copyright laws of the United States . . . ."

Act of March 4, 1909, § 25, 35 Stat. 1075, formerly codified as 17 U.S.C. § 101. Congress completely eliminated civil penalties for copyright infringement and authorized recovery of "such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . ." *Id* § 101(b). Congress further provided "in lieu of actual damages and profits, such damages as to the court shall appear to be just, and assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated . . . ." *Id*. These "in lieu of" damages were subject to specific guidelines for certain types of copyrighted works but in general could not "exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty." *Id.; see Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202 (1931) (describing application of statutory range).

"In lieu of" damages were a complete departure from the remedies Congress had authorized under prior statutes. "In lieu of" damages were an alternative to actual damages where actual damages were inadequate—prior statutes established only a single remedy. "In lieu of" damages were to be assessed by the court guided only by "its discretion" within prescribed ranges—earlier statutes specified the amount and calculation of damages (except in the limited circumstances in which actual damages were available), authorizing no discretion, and using prior ranges only to limit total recovery. "In lieu of" damages were determined per copyrighted *work* infringed—prior statutes prescribed sums calculated by multiplying a fixed amount per infringing sheet or copy in the possession of, or sold by, the infringer (*i.e.*, the number of infringements). Finally, "in lieu of" damages were paid in their entirety to the copyright owner—previous stautes required that all prescribed sums be shared with the government.

The Copyright Act of 1976 clarified and refined "in lieu of" damages—now referred to for the first time as

"Statutory Damages"—that were created in the 1909 Act. Section 504(b) of the 1976 Act continues to authorize recovery of actual damages and profits, while Section 504(c) retains the basic concept of "in lieu of" damages but eliminates all distinctions among copyrighted works—creating a single range within which an award of Statutory Damages must fall—and authorizing the copyright owner, rather than the court, to elect this remedy "at any time before final judgment is rendered . . . ." 17 U.S.C. § 504 (c)(1). The 1976 Act also introduced additional discretion to expand the statutory range based on findings of "willful" or "innocent" infringement and prohibited any award of Statutory Damages against a nonprofit educational or broadcast entity that believed in good faith that its use of copyrighted work was a fair use under the statute. *Id.* § 504(c)(2).

A review of the statutory history demonstrates three fundamental points. First, Statutory Damages bear no resemblance to the fixed civil penalties that Congress had established for copyright infringement by 1791. Feltner's inaccurate reference to these civil penalties as "statutory damages" cannot conceal the fact that nothing even remotely like the relief authorized under Section 504(c) was available under any statute when the Seventh Amendment was adopted or for well over 100 years thereafter. Second, these civil penalties were the *sole* remedy available at law in 1791 and remained a dominant feature of the legal relief authorized by Congress until 1909. From 1790 to 1909, Congress, rather than either a judge or jury, determined the legal remedy for copyright infringement (and the equitable remedy since 1819), and with limited exceptions, Congress used that authority to make fixed civil penalties the only means of legal redress until this century. Finally, Section 504(c)'s statutory lineage does not resolve the issue before the Court. The Statutory Damages Congress created in 1909 and refined in 1976 have no historical precedent. The Court, therefore,

must look elsewhere to determine the nature of Statutory Damages.

b. The Structure and Purpose of Statutory Damages Are Inherently Equitable.

The lack of an historical precedent for Statutory Damages requires that the Court assess the nature of this remedy by examining its structure and purpose in light of basic legal and equitable principles. Statutory Damages are structured as an alternative to inadequate actual damages which the copyright owner may elect at any time prior to final judgment. The purpose is to allow sufficient flexibility and discretion to balance a variety of interests, including providing "restitution of profit and reparation for injury," "discourag[ing] wrongful conduct," and "vindicat[ing] the statutory policy." *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952). The structure and purpose of Statutory Damages as provided in Section 504(c) demonstrate the equitable nature of this remedy.

Alternative to Inadequate Legal Remedy. Statutory Damages are authorized as an alternative to actual damages. The fundamental hallmark of equity is the ability to provide a remedy in the "absence of an adequate and certain remedy at law." *Davis v. Wallace*, 257 U.S. 477, 482 (1921); *see, e.g., American Life Ins. Co. v. Stewart*, 300 U.S. 203, 214 (1937) ("A remedy at law does not exclude one in equity unless it is equally prompt and certain and in other ways efficient"). As the Court has explained, Statutory Damages fulfill just such a role:

> The phraseology of the [Statutory Damages] section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect the old law was

> unsatisfactory. In many cases, plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged willful and deliberate infringement.
>
> . . . . [T]he purpose of the act is not doubtful. The *trial judge* may allow such damages as he deems to be just [within the statutory limits].

Douglas v. Cunningham, 294 U.S. 207, 209-10 (1935) (emphasis added).

Election of Copyright Owner. Section 504(c) provides that only the copyright owner is authorized to elect Statutory Damages as an alternative to actual damages. This election mirrors the ability that copyright owners had prior to the merger of law and equity to choose among available remedies by filing suit in a court of law or a bill in a court of equity. Rather than choosing between courts, the copyright owner now must elect among available remedies in the now-unified court. Statutory Damages thus provide the equitable alternative to which a copyright owner formerly would have been required to seek from a separate court.

Exercise of Discretion. The Copyright Act authorizes the court to exercise broad discretion to determine Statutory Damages within prescribed limits without evidence of, or even reference to, the copyright owner's economic loss, the infringer's gain, or any other guidelines or criteria. *See. e.g., Douglas*, 294 U.S. at 210 ("the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case"). Such flexibility in fashioning a remedy is a fundamental characteristic of equity and stands in stark contrast to an award of actual damages, which must be based on proof of the existence and extent of economic harm or personal injury to the plaintiff and/or economic benefit to the defendant. *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("Equity eschews mechanical rules" and depends

on "flexibility."). The Court has observed that the varied nature of copyright infringements requires that the trial judge be given discretion to ensure an appropriate remedy: "The necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide *judicial* discretion within limited amounts conferred by this statute." *F.W. Woolworth Co.*, 344 U.S. at 232 (emphasis added); *see generally Freeman v. Pitts*, 503 U.S. 467, 487 (1992) ("The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way").

Balancing Equities. Finally, equity seeks to provide a fair and balanced result, rather than a rigid remedy designed only to compensate one party for a loss caused by the other, as is the case at law. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("it is the historic purpose of equity to 'secur[e] complete justice"), quoting *Brown v. Swann*, 10 Pet. 497, 503 (1836)); *Brotherhood of Locomotive Engr's v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 535 (1960) ("balancing of these competing claims of irreparable hardship is, however, the traditional function of the equity court"). Section 504(c) affords the court absolute flexibility not only to award Statutory Damages anywhere within the Initial Range of between $500 and $20,000 per work infringed, but also the discretion to modify that range based on the state of mind and identity of the copyright infringer. Thus, the court may—but need not—increase the award to a maximum of $100,000 for "willful" infringement (as the District Court declined to increase the award here); may—but need not—decrease the minimum to $200 if the infringer did not know and had no reason to know that his or her conduct was an infringement (*i.e.*, was "innocent"); and cannot award Statutory Damages against a nonprofit educational or broadcast entity that believed in good faith that its conduct was a fair use. The losses suffered by the copyright owner do not vary with the culpability or identity of the

infringer, and an award of *actual* damages under Section 504(b) takes no account of such circumstances. Statutory Damages, on the other hand, authorize or require that the court consider factors other than proof of loss as a means of ensuring fairness to the parties, as well as to other copyright owners and users, rather than blindly compensating the complaining copyright owner.

Feltner nevertheless contends that Statutory Damages provide compensation and punishment and thus, like actual and punitive damages, are a legal remedy. Such contentions, however, highlight (rather than undermine) the unique and equitable nature of this remedy. Statutory Damages may fulfill one or more of the following goals: compensation for the copyright owner; deterrence of future infringements; vindication of statutory policy; or consideration of the identity and culpability (both "willfulness" and "innocence") of the infringer. Compensation and punishment thus are only two of the *potential* purposes of an award of Statutory Damages, and any given award may represent both, only one, or neither of these purposes.

Compensation—or, more properly "remuneration"—is one potential goal of Statutory Damages, but an award of Statutory Damages may not be compensatory at all. Statutory Damages require no proof of actual loss or injury to the copyright owner and the amount of the award is subject to reduction or even elimination depending on the culpability and identity of the infringer, regardless of actual economic injury suffered by a plaintiff. In stark contrast, the remuneration provided through actual damages awards is a legal entitlement that must be based on evidence and cannot be withheld, in whole or in part, once the plaintiff proves the quantum of injuy. *See, e.g., McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996).

Nor are Statutory Damages analogous to punitive damages. "Punitive damages by definition are not intended to

compensate the injured party but rather to punish." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981). An award of Statutory Damages within the Initial Range, however, may not represent punishment at all. To the contrary, such an award could be less than even the amount necessary to provide compensation in order to *avoid* punishing the infringer. The monetary relief thus may represent nothing more than recognition of the importance of protecting copyrights from infringement, without consideration of compensation or punishment. Indeed, the statute itself requires just such a result when the infringer is a non-profit educational or broadcasting entity acting with a good faith belief that its use of the copyrighted work was a fair use. 17 U.S.C. § 504(c)(2).

Punitive damages, as this Court also has observed, require outrageous conduct, "not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence." *Smith v. Wade*, 461 U.S. 30, 48 (1983); *see* Restatement (Second) of Torts § 908(2) & cmt. b (1977) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."). Statutory Damages require no such finding—any liability determination is sufficient to trigger an award of Statutory Damages. The court thus could award Statutory Damages in an amount designed to deter future infringement, even if the infringer did not engage in any outrageous conduct. Indeed, an infringer may have been "innocent"—*i.e.*, not have known or had reason to believe that his or her conduct constituted copyright infringement—yet that defendant is subject to the same maximum $20,000 award authorized under Section 504(c) as a more culpable infringer.

Damages cannot be characterized as "punitive damages" if they may be awarded regardless of whether the infringer's conduct was outrageous; nor can Statutory Dam-

ages be deemed "compensatory damages" if they may be awarded in a sum that is less than the amount necessary to compensate the plaintiff for actual injury.

Feltner also appears to maintain that Statutory Damages are legal because they are an award of money, rather than an injunction or similar relief. This Court, however, has emphasized that "We need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief." *Curtis v. Loether*, 415 U.S. 189, 196 (1974); *accord, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-17 (1985). Equity courts historically have awarded monetary relief. *E.g., Fowle v. Lawrason's Ex'r*, 30 U.S. (5 Pet.) 495, 503 (1831) ("that a court of chancery has jurisdiction in matters of account cannot be questioned"); *Stevens v. Gladding*, 58 U.S. (17 How.) 447 (1854). Moreover, courts award sanctions (including sanctions under Fed. R. Civ. Proc. 11), costs, and attorneys' fees, that are nevertheless considered "equitable" and are determined by the judge, not a jury. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983); *Christiansburg Garment Center v. E.E.O.C.*, 434 U.S. 412, 419 (1978).[26] The District Court in this case awarded Columbia over $750,000 in costs and attorneys' fees, and while Feltner has challenged the amount of that award, he has never questioned the court's authority to make such an award. *See* Cert. Pet. App. at 23a. The monetary aspect of Statutory Damages does not alter their

[26] Feltner maintains that consideration of the infringer's profits is the only "arguable" equitable aspect of Statutory Damages but that such consideration is inapplicable here because the award "need bear no relation whatsoever to any profits earned by the infringer." Br. of Pet'r at 34-35. Of course, the award also need bear no relation whatsoever to compensating the copyright infringer or deterring future infringements—the two purposes of Statutory Damages on which Feltner relies to characterize the remedy as legal. Feltner's own logic thus dictates that Statutory Damages cannot be considered legal because no relationship to compensation or deterrence is required.

inherent nature as an equitable remedy.[27] The Seventh Amendment, therefore, does not require a jury determination of Statutory Damages.

B. Statutory Damages Need Not Be Determined by a Jury to Preserve the Substance of Any Common Law Right as It Existed in 1791.

Statutory Damages are an equitable remedy, which means that the Court need not reach the second prong of its Constitutional inquiry, *i.e.*, "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."

[27] Feltner also quotes this Court's language out of context for the otherwise unsupported proposition that "[a]n award of damages is not considered equitable under the Seventh Amendment if the plaintiff is 'free to seek an equitable remedy in addition to, or independent of, legal relief' . . . ." Br. of Pet'r at 36 (quoting *Tull*, 481 U.S. at 425). The language Feltner quotes comes from the Court's discussion of the nature of the action, not the nature of the remedy, and the Court merely clarified the well-established principle that a jury trial cannot be avoided by seeking both legal and equitable remedies in the same action:

> Finally, the Government was free to seek an equitable remedy in addition to, or independent of, legal relief. Section 1319 does not intertwine equitable relief with the imposition of civil penalties. Instead, each kind of relief is separately authorized in a separate and distinct statutory provision. Subsection (b), providing injunctive relief, is independent of subsection (d), which provides only for civil penalties. In such a situation, if a "legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought."

Tull, 481 U.S. at 425 (quoting *Curtis*, 415 U.S. at 196). This Court has never held, as Feltner asserts, that monetary relief is not considered equitable simply because both legal and equitable remedies are available. Indeed, the results of such a holding would be to divest sanctions and attorneys' fees of their equitable nature and require a jury determination of such awards along with the legal relief requested.

Markman, 116 S. Ct. at 1389. Even were the Court to conclude that Statutory Damages are legal, however, no right to a jury determination of damages for copyright infringement existed in 1791. Rather, Congress historically established such damages by statute, fixing the amount as well as how that amount was to be calculated —50 cents for each infringing sheet. To paraphrase the Court: "Since Congress itself may fix [damages for copyright infringement], it may delegate that determination to trial judges." *Tull*, 481 U.S. at 427. None of the issues Feltner raises, therefore, required a jury determination.

1. *The Amount of Copyright Infringement Damages Historically Was Determined by Congress, and Congress Has Properly Delegated That Authority to Judges.*

Prior to adoption of the Seventh Amendment, the common law of copyright was supplanted by statute in both England and the United States. *See, e.g., Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). Thus, an action at law for copyright infringement in 1791—including available remedies—was governed exclusively by the statute. That statute established damages for copyright infringement in "the sum of fifty cents for every sheet which shall be found in [the infringer's] possession. . . ." Act of May 31, 1790, ch. 15, sec. 2, 1st Cong., 2d Sess., 1 Stat. 124, 125. The amount of the award did not depend on proof of any loss, nor did the penalty per sheet vary according to the factual record in the case. The jury, therefore, did not determine the amount of damages per published "work" or "sheet" infringed—Congress made that determination, and Congress continued to set the amount of such damages (with exceptions for actual damages in limited circumstances) in every copyright statute until 1909. *See supra* Section II.A.2.a.

This Court has previously concluded under virtually identical circumstances that a jury determination of the

amount of damages is not necessary to preserve the substance of the common law right of trial by jury:

> Congress' authority to fix the penalty by statute has not been questioned, and it was also the British practice. In the United States, the action to recover civil penalties usually seeks the amount fixed by Congress. The assessment of civil penalties thus cannot be said to involve the "substance of a common-law right to a trial by jury," nor a "fundamental element of a jury trial."
>
> Congress' assignment of the determination of the amount of civil penalties to trial judges therefore does not infringe on the constitutional right to jury trial. *Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges.* In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges. We therefore hold that a determination of a civil penalty is not an essential function of a jury trial, and that the Seventh Amendment does not require a jury trial for that purpose in a civil action.

Tull, 481 U.S. at 425-26 (citations omitted and emphasis added).

Feltner attempts to distinguish *Tull* as "a limited exception to the general rule that legal damages are to be assessed by a jury, in circumstances where the government seeks to enforce civil penalties to further a complex regulatory scheme." Br. of Pet'r at 45. These are distinctions without a difference. The Court in *Tull* engaged in the same inquiry as is required here—a review of the historical determination of damages once liability for a statutory cause of action has been established—and found, as is the case here, that the common law practice was to have the amount of those damages determined by trial judges through a delegation of authority from Congress, not by

a jury.[28] The fact that *Tull* involved an analysis of civil penalties is an analogous, rather than distinguishing, factor because, as Feltner recognizes elsewhere in his brief, damages under the early copyright statutes were, in part, a civil penalty (half of which went to the federal government), and Feltner has never questioned the ability of Congress to establish such damages, including their amount.[29] Congress, moreover, has established a flexible scheme for assessing Statutory Damages that does not require evidence of loss but relies on the exercise of discretion to fulfill the often inconsistent or conflicting goals of restitution, compensation, deterrence, statutory policy, and the culpability and identity of the defendant—"the kinds of calculations traditionally performed by judges." *Tull*, 481 U.S. at 427.

The remainder of Feltner's argument—that determining the amount of damages under a statutory claim generally was a fundamental role of the jury at common law—comes to naught in light of the specific history of actions for copyright infringement and the Court's decision in

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[28] The applicability of *Tull* is further strengthened by the fact that copyright statutes provide a direct historical reference, rendering unnecessary the Court's exercises in *Tull* to find analogous actions. The existence of such a direct reference addresses Justice Scalia's concern in his dissent that the closest historical analogy was to criminal sentencing, which he found inapplicable to civil actions. *See* 481 U.S. at 427-28 (Scalia, J., concurring in part and dissenting in part). Here, the early copyright statutes unequivocally established the amount and calculation of civil damages for infringement as a matter for Congress to determine. The jury's role was strictly limited to determining the number of sheets (i.e. infringements) by which to multiply the amount fixed by Congress. Similarly, the number of infringements for which Feltner was liable was determined by summary judgment (and expanded by stipulation of the parties). *See* section IIB3, *infra*.

[29] Nor is the lack of any civil penalty under Section 504(c) a distinguishing factor. The critical fact is that the amount of the only legal remedy available in 1791 was fixed by Congress, regardless of whether that relief is characterized as a civil penalty.

Tull. Whatever the truth of Feltner's assertion in other contexts, it clearly was not the case for claims brought under copyright statutes, either in England or the United States. As the Court has observed, moreover, "[t]he Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability," and "[n]othing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial." *Tull*, 481 U.S. at 425-26 & n.9.

Finally, Feltner suggests throughout his brief that the statutory range and actual amount of the Statutory Damages awarded in this case somehow necessitates a jury determination of this issue. This Court has never found a right to jury trial based on the potential monetary recovery available. To the contrary, the Court did not even consider relevant to its analysis, much less find a right to a jury determination of, civil penalties ranging from $0 to $10,000 per day of statutory violation or the potential liability to the party before the Court of $22,890,000—well over twice the amount of Statutory Damages awarded here. *See Tull*, 481 U.S. at 414-15. The District Court, moreover, awarded only $20,000 for each work infringed; the $8.8 million judgment resulted arithmetically from the finding that Feltner had infringed 440 works. As shown in Section 3, *infra*, the District Court's finding regarding the number of works infringed was purely a legal one, made on the application of legal principles to undisputed facts.

The structure, purpose, and history—not the quantity—of the remedy informs the Court's analysis of whether the Seventh Amendment guarantees a right to jury determination, and those factors support the conclusion that no such right exists with respect to Statutory Damages.

2. *Findings of Willfulness and Innocence Are Relevant Only to Establish the Applicable Range of Statutory Damages and Thus Are Within the Authority of the Judge.*

No jury at common law was asked to determine whether a copyright infringer's conduct was "willful" or "innocent" because those findings were (and are) irrelevant to the issues of liability for copyright infringement or calculating an award of actual damages. *See, e.g., Fiest Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) ("To establish ingringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituents elements of the work that are original."). The concept of culpability (i.e. "willfulness" and "innocence") was introduced by Congress in 1976 and is relevant by statute only to expand the Initial Range of Statutory Damages. Section 504(c) allows the court in its discretion to increase the $20,000 maximum award per work infringed in the Initial Range to $100,000 upon a finding of "willfulness" and to decrease the Initial Range's $500 minimum to $200 for "innocent" infringement. These findings thus only adjust the limits on the exercise of discretion to award Statutory Damages. They need not—and often do not—form the basis on which the court determines the amount to be awarded. Here, for example, the District Court awarded Statutory Damages of $20,000 per work infringed and did not exercise its discretion to increase that award based on its finding that Feltner willfully infringed Columbia's copyrights.[30] Cert. Pet. App. at 23a.

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[30] After hearing Feltner's evidence at trial, the District Court found Feltner's conduct to be "willful" but nevertheless awarded only $20,000 per work infringed—the maximum amount permitted *without* a willfulness finding (and *with* a finding of "innocence"). Even had a jury heard that same evidence and found Feltner's conduct "innocent," the court would have had the authority to make the same $20,000 award, rendering moot any jury determination.

"Willfulness" and "innocence" are relevant only to establish the limits on the amount of Statutory Damages available and, as such, are intimately intertwined with the Congressionally-prescribed discretion to determine the amount of the damages award. Congress, as discussed above, has unquestioned authority to establish the amount of damages available for copyright infringement and has delegated that authority to judges to award Statutory Damages. Because findings of culpability affect only the amount of (as opposed to liability for) Statutory Damages, they need not be made by a jury in order to preserve the substance of any common law right that existed in 1791.

Feltner concedes that "there is no direct historical precedent" for a determination of "willful" or "innocent" copyright infringement but analogizes those findings to claims for punitive damages, contending that "it is unthinkable that such basic factual issues" would not have been determined by a jury. Br. of Pet'r at 40. Punitive damages, however, were not available for copyright infringement in 1791, and as detailed above, Statutory Damages are not analogous to punitive damages. Nor are juries asked to find circumstances that would *reduce or eliminate* any monetary recovery based on the lesser culpability or identity of the liable party regardless of economic injury to the plaintiff. *See supra* at Section II.A.2.b. In addition, judges frequently determine "basic factual issues" affecting the amount of monetary awards, including, for example, multiple factors used to calculate civil penalties under the Clean Water Act and the reasonableness of attorneys' fees. *See, e.g., Tull*, 481 U.S. at 427; *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983). A jury determination thus is not necessary for either the amount of damages or the dependent issue of the "willfulness" or "innocence" of the infringing conduct.[31]

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[31] Columbia did not request a finding of willfulness on summary judgment (which was granted prior to Columbia's election of Statu-

3. *The Number of Works Infringed Was Determined as a Matter of Law.*

Finally, no jury would have been required to determine the number of works infringed in this case because the facts bearing on that determination were established prior to trial. Pursuant to the Second Amended Pretrial Order, Columbia and Feltner stipulated that Feltner was responsible for 984 infringements (*i.e.*, infringing broadcasts) of 440 episodes of four television series (assuming that identical episodes of "WHO'S THE BOSS?" broadcast by WNFT and WTVX were counted separately). Pretrial Order at ¶ 6 & pp. 19-43; Def's Mem. of Contentions of Fact & Law of 2/9/94 (R. 263) at 18. The Pretrial Order expanded and refined the District Court's summary judgment ruling that Feltner was responsible for 664 separate infringements (*i.e.*, infringing broadcasts). The only question that remained at the trial's outset related to the number of separate awards of Statutory Damages which would be supported by these stipulated facts.[22]

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tory Damages), but the District Court's summary judgment ruling (affirmed by the Ninth Circuit) that Feltner *could not reasonably believe* that Columbia had not effectively terminated the license agreements mandated a finding of willfulness. *See Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336, *cert. denied*, 498 U.S. 1109 (1991) ("To refute evidence of willful infringement, [the defendant] must not only establish its good faith belief of the innocence of its conduct, it must also show it was reasonable in holding such belief.")

[32] Feltner incorrectly states that the number of infringements was a factual issue remaining for trial, relying on a single pretrial comment by the District Court. Br. of Pet'r at 37-38, n. 28 & 39-40. In light of the Pretrial Order and the District Court's summary judgment ruling of 664 infringements, the court's statement at the outset of the trial that "how many infringements were involved" remained to be tried (Trial Tr. of 3/15/94 (J.A. 13) at 7) was most likely a less than precise attempt to identify the issue of "how many infringing works were involved"—an issue that the court disposed of moments later. *Id.* at 10. This conclusion is buttressed by: (a) the court's ruling, moments later, that it "will treat every broadcast of every episode as a separate infringement

The number of separate statutory damage awards turned on two legal questions: (1) whether each episode of a television series (as opposed to the entire series) was a separate work; and (2) whether WNFT and WTVX were separate infringers (and therefore broadcasts of the same episodes of "WHO'S THE BOSS?" by both stations would support separate awards of Statutory Damages). Feltner characterized both of these issues as legal contentions in papers filed with the District Court. Def's Mem. of Contentions of Fact and Law of Feb. 9, 1994 (R. 263) at 9, 13-22. Columbia responded to these legal contentions in its pretrial brief as legal arguments. Pl.'s Trial Br. (J.A. 13) at 1, 8-11. At the outset of the trial, the District Court resolved both issues as matters of law.

With respect to the first issue, Circuit courts have unanimously held—as the Ninth Circuit concluded here—that individually produced episodes of a television series that are individually broadcast or rented to viewers are separate works for copyright purposes. *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 768-70 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1248 (1997); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116-17 (1st Cir. 1993); *Twin Peaks Prods. v. Publications Int'l*, 996 F.2d 1366, 1380-81 (2d Cir. 1993). Feltner offered no evidence that the four Columbia television series were materially different from the television series "TWIN PEAKS," the subject of the Second Circuit's decision of the same name.

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and not treat each series as one infringement" (*id.*); and (b) the court's Order for Judgment that a "total of Four Hundred and Forty (440) episodes of Columbia's television programs were broadcast" and "each episode constitutes a separate work for purposes of computing Statutory Damages; *Twin Peaks Prods. v. Publications Int'l*, 996 F.2d 1366 (2d Cir. 1993)." Cert. Pet. App. at 21a-22a. In any event, no evidence was submitted at trial regarding the number of infringing broadcasts or the number of episodes involved. Instead, that information came exclusively from the Pretrial Order, which was stipulated to by Columbia and Feltner.

The second question—whether television station WNFT and WTVX are separate infringers—also was purely legal in nature. The second question in turn involved two legal issues: (i) whether Feltner's joint and several liability with the three infringing stations converts the three stations (three separate corporations) into a single infringer; and (ii) application of the doctrine of "judicial estoppel" (based upon alternative "conspiracy" Complaint allegations) as articulated in *RCA/Ariola Int'l., Inc. v. Thomas & Grapon Co.*, 845 F.2d 773, 779 (8th Cir. 1988) (holding a party who "invited any error has no grounds to complain").[33] Def's Mem. of Contentions of Fact & Law of 2/9/94 (R. 263) at 18; Pl.'s Trial Br. (J.A. 13) at 8-10. Neither of these considerations are even properly before this Court, much less present anything for a jury to decide under the circumstances of this case.

None of the issues Feltner raises requires a jury determination "in order to preserve the substance of the common-law right as it existed in 1791." *Markman*, 116 S. Ct. at 1389. The amount and calculation of legal damages for infringement of published copyrighted works were prescribed by Congress in 1791 and continued to be dictated by statute until 1909. Congress' delegation of that authority to trial judges in the 1909 and 1976 Acts did not change the fact that Congress, rather than a jury, has historically set legal damages for copyright infringement. Even if Statutory Damages are considered to be legal, therefore, the Seventh Amendment does not require that they be awarded by a jury.

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[33] Judicial estoppel "is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by the court at its discretion." *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (quoting *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting)), *cert. denied*, 501 U.S. 1260 (1991).

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's judgment and the decision of the United States Court of Appeals for the Ninth Circuit that Petitioner C. Elvin Feltner, Jr. did not have a right under Section 504(c) or under the Seventh Amendment to the United States Constitution to have the amount of Statutory Damages determined by a jury after Petitioner's liability for copyright infringment had been determined on summary judgment.

Respectfully submitted,

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APPENDIX

APPENDIX

1. Section 504 of the Copyright Act of 1976 (as amended and codified, 17 U.S.C. § 504 (1997))[1]

§ 504. Remedies for infringement: Damages and profits

(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of stautory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two

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[1] *See* Pub.L. 94-553, Oct. 19, 1976, 90 Stat. 2585; Pub. L. 100-568 § 10(b), Oct. 31, 1988, 102 Stat. 2860.

or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court it [2] its discretion may reduce the award of statutory damages to a sum of not less than $200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

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[2] This error has been corrected in recently enacted (but not yet codified) technical amendments to the Copyright Act. Pub.L. 105-80 § 12(a)(13), Nov. 13, 1997, 111 Stat. 1529.

2. Act of March 4, 1909, § 25, 35 Stat. 1075 (later amended and codified as 17 U.S.C. § 101)

§ 25. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction—To an injunction restraining such infringement:

(b) Damages and profits; amount; other remedies —To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty.

First. In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions, $10 for every infringing performance; . . .

3. Act of March 2, 1895, 28 Stat. 965

SEC. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed; and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale: *Provided, however*, That in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions

of this section shall be not less than one hundred dollars, nor more than five thousand dollars, and: *Provided, further*, That in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dolars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States.

4. Act of July 8, 1870, 16 Stat. 212

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SEC. 98. *And be it further enacted*, That if any person shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, musical composition, print, cut, engraving, or photograph, or other articles herein named, for which he has not obtained a copyright, every person so offending shall forfeit and pay one hundred dollars; one moiety thereof to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action in any court of competent jurisdiction.

SEC. 99. *And be it further enacted*, That if any person, after the recording of the title of any book as herein provided, shall within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, or import or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such book, such offender shall forfeit every copy thereof to said proprietor, and shall also forfeit and pay such damages as may be recovered in a civil

action by such proprietor in any court of competent jurisdiction.

SEC. 100. *And be it further enacted,* That if any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as herein provided, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the said proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, pubished, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or which have by him been sold or exposed for sale; one moiety thereof to the proprietor and the other to the use of the United States, to be recovered by action in any court of competent jurisdiction.

SEC. 101. *And be it further enacted,* That any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, to be recovered by action in any court of competent jurisdiction; said damages in all cases to be assessed at such sum, not less than one hundred

dollars for the first, and fifty dollars for every subsequent performance, as to the court shall appear to be just.

SEC. 102. *And be it further enacted,* That any person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained (if such author or proprietor be a citizen of the United States, or resident therein,) shall be liable to said author or proprietor for all damages occasioned by such injury, to be recovered by action on the case in any court of competent jurisdiction.

SEC. 105. *And be it further enacted,* That in all actions arising under the laws respecting copyrights the defendant may plead the general issue, and give the special matter in evidence.

SEC. 106. *And be it further enacted,* That all actions, suits, controversies, and cases arising under the copyright laws of the United States shall be originally cognizable, as well in equity as at law, whether civil or penal in their nature, by the circuit courts of the United States, or any district court having the jurisdiction of a circuit court, or in the supreme court of the District of Columbia, or any Territory. And the court shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as the court may deem reasonable.

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SEC. 108. *And be it further enacted,* That in all recoveries under the copyright laws, either for damages, forfeitures, or penalties, full costs shall be allowed thereon.

5. Act of August 18, 1856, 11 Stat. 138

AN ACT supplemental to an act entitled "An act to amend the several acts respecting copyright," approved February third, eighteen hundred and thirty-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any copyright hereafter granted under the laws of the United States to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs or assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright is obtained; and any manager, actor, or other person acting, performing, or representing the said composition, without or against the consent of the said author or proprietor, his heirs or assigns, shall be liable to damages to be sued for and recovered by action on the case or other equivalent remedy, with costs of suit in any court of the United States, such damages in all cases to be rated and assessed at such sum not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just: *Provided, nevertheless,* That nothing herein enacted shall impair any right to act, perform, or represent a dramatic composition as aforesaid, which right may have been acquired, or shall in future be acquired by any manager, actor, or other person previous to the securing of the copyright for the said composition, or to restrict in any way the right of such author to process in equity in any court of the United States for the better and further enforcement of his rights.

6. Act of February 3, 1831, 4 Stat. 36

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SEC. 6. *And be it further enacted,* That if any other person or persons, from and after the recording the title of any book or books, according to this act, shall, within the term or terms herein limited, print, publish, or import, or cause to be printed, published, or imported, any copy of such book, or books, without the consent of the person legally entitled to the copyright thereof, first had and obtained in writing, signed in the presence of two or more credible witnesses, or shall, knowing the same to be so printed or imported, publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such book without such consent in writing then such offender shall forfeit every copy of such book to the personal legally, at the time, entitled to the copyright thereof and shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, either printed, or printing published, imported, or exposed to sale, contrary to the intent of this act, the one moiety thereof to such legal owner of the copyright as aforesaid, and the other to the use of the United States, to be recovered by action of debt in any court having competent jurisdiction thereof.

SEC. 7. *And be it further enacted*, That if any person or persons after the recording the title of any print, cut, or engraving, map, chart or musical composition, according to the provisions of this act, shall, within the term or terms limited by this act, engrave, etch, or work, sell, or copy, or cause to be engraved, etched, worked, or sold, or copied, either on the whole, or by varying, adding to, or diminishing the main design with intent to evade the law; or shall print or import for sale, or cause to be printed, or imported for sale, any such map, chart, musical

composition, print, cut, or engraving, or any parts thereof, without the consent of the proprietor or proprietors of the copyright thereof, first obtained in writing, signed in the presence of two credible witnesses; or, knowing the same to be so printed or imported without such consent, shall publish, sell, or expose to sale, or in any manner dispose of any such map, chart, musical composition, engraving, cut, or print, without such consent, as aforesaid; then such offender or offenders, shall forfeit the plate or plates on which such map, chart, musical composition, engraving, cut, or print, shall be copied, and also all and every sheet thereof so copied or printed as aforesaid, to the proprietor or proprietors of the copyright thereof; and shall further forfeit one dollar for every sheet of such map, chart, musical composition, print, cut, or engraving, which may be found in his or their possession, printed or published, or exposed to sale, contrary to the true intent and meaning of this act; the one moiety thereof to the proprietor or proprietors, and the other moiety to the use of the United States, to be recovered in any court having competent jurisdiction thereof.

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SEC. 9. *And be it further enacted*, That any person or persons who shall print or publish any manuscript whatever without the consent of the author or legal proprietor first obtained as aforesaid, (if such author or proprietor be a citizen of the United States, or resident therein,) shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognisance thereof; and the several courts of the United States empowered to grant injunctions to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions, in like manner, according to the prin-

ciples of equity, to restrain such publications of any manuscript as aforesaid.

SEC. 10. *And be it further enacted*, That, if any person or persons shall be sued or prosecuted, for any matter, act, or thing done under or by virtue of this act, he or they may plead the general issue and give the special matter in evidence.

SEC. 11. *And be it further enacted*, That, if any person or persons, from and after the passing of this act, shall print or publish any book, map, chart, musical composition, print, cut, or engraving, not having legally acquired the copyright thereof, and shall insert or impress that the same hath been entered according to act of Congress, or words purporting the same, every person so offending shall forfeit and pay one hundred dollars; one moiety thereof to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action of debt, in any court of record having cognisance thereof.

SEC. 12. *And be it further enacted*. That, in all recoveries under this act, either for damages, forfeitures, or penalties, full costs shall be allowed thereon, any thing in any former act to the contrary notwithstanding.

7. Act of February 15, 1819, 3 Stat. 481

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the circuit courts of the United States shall have original cognisance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity, filed by any

party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable: *Provided, however,* That from all judgments and decrees of any circuit courts, rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the Supreme Court of the United States, in the same manner, and under the same circumstances, as is now provided by law in other judgments and decrees of such circuit courts.

8. Act of April 29th, 1802, 2 Stat. 171

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SEC. 3. *And be it further enacted.* That if any print-seller or other person, whatsoever, from and after the said first day of January next, within the time limited by this act, shall engrave, etch or work as aforesaid, or in any other manner copy or sell, or cause to be engraved, etched, copied or sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, re-print, or import for sale, or cause to be printed, re-printed, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof, first had and obtained, in writing, signed by him or them respectively, in the presence of two or more credible witnesses; or knowing the same to be so printed or re-printed, without the consent of the proprietor or proprietors, shall publish, sell, or expose to sale or otherwise, or in any other manner dispose of any such print or prints, without such consent first had and obtained, as aforesaid, then such offender or offenders shall forfeit the

plate or plates on which such print or prints are or shall be copied, and all and every sheet or sheets (being part of or whereon such print or prints are or shall be copied or printed) to the proprietor or proprietors of such original print or prints, who shall forthwith destroy the same; and further, that every such offender or offenders shall forfeit one dollar for every print which shall be bound in his, her, or their custody; either printed, published, or exposed to sale, or otherwise disposed of, contrary to the true intent and meaning of this act, the one moiety thereof to any person who shall sue for the same, and the other moiety therof to and for the use of the United States, to be recovered in any court having competent jurisdiction thereof.

SEC. 4. *And be it further enacted,* That if any person or persons from and after the passing of this act, shall print or publish any map, chart, book or books, print or prints, who have not legally acquired the copyright of such map, chart, book or books, print or prints, and shall, contrary to the true intent and meaning of this act, insert therein or impress thereon that the same has been entered according to act of Congress, or words purporting the same, or purporting that the copyright thereof has been acquired; every person so offending shall forfeit and pay the sum of one hundred dollars, one moiety thereof to the person who shall sue for the same, and the other moiety thereof to and for the use of the United States, to be recovered by action of debt in any court of record in the United States, having cognizance thereof given. *Provided always,* That in every case for forfeitures hereinbefore given, the action be commenced within two years from the time the cause of action may have arisen.

9. Act of May 31, 1790, 1 Stat. 124

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SEC 2. *And be it further enacted*. That if any other person or persons, from and after the recording the title of any map, chart, book or books, and publishing the same as aforesaid, and within the times limited and granted by this act, shall print, reprint, publish, or import, or cause to be printed, reprinted, published, or imported from any foreign Kingdom or State, any copy or copies of such map, chart, book or books, without the consent of the author or proprietor thereof, first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed, reprinted, or imported, shall publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such map, chart, book or books, without such consent first had and obtained writing as aforesaid, then such offender or offenders shall forfeit all and every copy and copies of such map, chart, book or books, and all and every sheet and sheets, being part of the same, or either of them, to the author or proprietor of such map, chart, book or books, who shall forthwith destroy the same: And every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, either printed or printing, published, imported or exposed to sale, contrary to the true intent and meaning of this act, the one moiety thereof to the author or proprietor of such map, chart, book or books who shall sue for the same, and the other moiety thereof to and for the use of the United States, to be recovered by action of debt in any court of record in the United States, wherein the same is cognizable. *Provided always*, That such action be commenced within one year after the cause of action shall arise, and not afterwards.

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SEC. 6. *And be it further enacted*, That any person or persons who shall print or publish any manuscript, without the consent and approbation of the author or proprietor thereof, first had and obtained as aforesaid, (if such author or proprietor be a citizen of or resident in these United States) shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof.